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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,
Petitioners,

v.

FRANK DYSON, et al.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE RESPONDENTS

N. ALEX BICKLEY,
Attorney of the City of Dallas,
DOUGLAS H. CONNER,
Assistant City Attorney,
501 Municipal Building,
Telephone: 748-9711, Ext. 294,
Dallas, Texas 75201,
Attorneys for Respondents.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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BRIEF OF THE RESPONDENTS

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Texas, Dallas Division, is reported at 358 F. Supp. 262, and is set forth in the Appendix at Pages 62 through 67. The Order of the United States Court of Appeals for the Fifth Circuit summarily affirming the dismissal of the Petitioners' Complaint is reported at 475 F. 2d 1402 and is set forth in the Appendix at Page 70.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. The Petition for Writ of Certiorari was received and docketed in the Supreme Court of the United States on July 16, 1973, and was granted on April 22, 1974. The jurisdiction of the Court is alleged by the Petitioners under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED BY PETITIONERS

1. May Petitioners, who have been fined for violating a municipal loitering ordinance, seek Federal declaratory relief against threatened future arrests and prosecutions under the same ordinance on the ground that it is blatantly unconstitutional?

2. May Petitioners, who have been fined for violating an allegedly unconstitutional municipal loitering ordinance, seek Federal equitable relief expunging any record of their arrest and conviction?

STATUTORY PROVISIONS PRINCIPALLY INVOLVED

Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991 is set out in Petitioners' Appendix, Pages 8a through 10a.

Article 4.14 of the Texas Code of Criminal Procedure:

> The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated

> in all criminal cases arising under the criminal laws of this State, in which the punishment is by fine only, and where the maximum of such fine may not exceed $200.00, and arising within such corporate city limits.

Article 44.17 of the Texas Code of Criminal Procedure:

> In all appeals from justice and corporation courts to the county court, the trial shall be de novo in the trial in the county court, the same as if the prosecution had been originally commenced in that court.

STATEMENT OF THE CASE

The Petitioners, Tom E. Ellis and Robert D. Love, brought this action against various named officials of the City of Dallas under Title 42, United States Code, Section 1983. Tom E. Ellis and Robert D. Love did not allege that they had any pending criminal proceedings against them but seek declaratory relief against possible future prosecution under the City of Dallas' Loitering Ordinance, Section 31-60 of the Dallas City Code. The Petitioners made no allegations in their Complaint of bad faith prosecution by any named or unnamed City of Dallas officials. The District Court considering the pleadings, reading the briefs, and hearing argument of counsel, found no allegations of bad faith prosecution, harassment or other unusual circumstances which would cause the Petitioners to suffer irreparable harm and injury through the enforcement of the subject ordinance. For those reasons more extensively set forth in its written opinion, the District Court on December 13, 1972, granted the Defendants-Respondents' Motion for Dismissal. The Petitioners by virtue of this dismissal were denied both injunctive and declaratory relief. This Court granted certiorari on April 22, 1974.

STATEMENT OF FACTS

The Petitioners' Complaint in the trial court alleges that they were arrested in the City of Dallas on January 18, 1972, and charged with violating Section 31-60, Revised Code of Civil and Criminal Ordinances of the City of Dallas (A-5).* Petitioners applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this Ordinance. On February 21, 1972, the Texas Court of Criminal Appeals denied the Petitioners' application for writ or prohibition without written opinion (A-7). In municipal court the Petitioners allege that they renewed their objections to the jurisdiction of that court on the ground that the ordinance which they were charged with violating was unconstitutional (A-7). The motion was denied and the Petitioners entered pleas of nolo contendere and were convicted. The municipal court records indicate that both Petitioners paid $12.50 each ($10.00 fine plus $2.50 court cost) (A-49).

The Petitioners never asserted in their Complaint the inadequacy of the state remedies nor did they raise this argument on appeal to the Fifth Circuit. The Petitioners are now raising for the first time in the federal courts, their argument that a trial de novo in the county court would subject the Petitioners to a more stringent sentence than that which existed in the City of Dallas' municipal court. The Petitioners never controverted or challenged in the trial court the Defendants-Respondents' affirmative allegation that Texas law provides an adequate remedy for any person charged with a violation of Ordinance 31-60. The affidavits of Henry J. Albach, Edward

* The designation "A" refers to the appendix filed to Petitioners' Brief.

Koppman, Robert E. Goodfriend, and Lon Curtis, were never made an exhibit or part of the Petitioners' Complaint. Although a trial de novo to the county court is sanctioned by Article 44.17, Code of Criminal Procedure, State of Texas, the Petitioners made no further effort to reurge the constitutionality of the subject ordinance in the state courts.

ARGUMENT AND AUTHORITIES

I.

WHEN THE PETITIONERS VOLUNTARILY ENTERED THEIR PLEAS OF NOLO CONTENDERE THEY WAIVED THEIR RIGHTS TO FURTHER ASSERT THEIR CONSTITUTIONAL RIGHTS AND PRIVILEGES.

The Petitioners seek to have a declaratory judgment holding the Dallas Municipal Loitering Ordinance unconstitutional and they further seek equitable relief expunging any record of their arrest and conviction under this subject ordinance. The Petitioners with assistance of their counsel filed a writ of prohibition prior to their appearance in municipal court (A-7, 29-33). In both the writ for prohibition and in municipal court the Petitioners objected to the constitutionality of Section 31-60 of the Dallas City Code (A-7 and 8). With apparently the advice of counsel, the Petitioners chose to plead nolo contendere rather than challenge further the constitutionality of Section 31-60, or further assert any defense in the state courts to the criminal charges filed against them.*

* Although the record is silent as to the counsel's presence in municipal court, it can be seen that Petitioners did have counsel prior to and after the proceedings in municipal court. This same counsel has represented the Petitioners since the filing of the writ of prohibition.

In *Bergeron v. Travis County Court*, 174 S.W. 365 (Tex. Crim. App. 1915), the Texas Court of Criminal Appeals gave clear and specific directions as to how to challenge the constitutionality, validity and jurisdiction of corporation court (now referred to as municipal court).*

The "proper place" to present a plea challenging the jurisdiction of corporation court, the constitutionality and validity of a local ordinance is in the corporation court "when the complaint was filed." *Bergeron v. Travis County Court*, supra, page 367. This decision states that the corporation court (now called municipal court) should have the first opportunity to rule on the constitutionality of an ordinance and entertain such plea that a defendant desires to bring therein, and *after* trial in corporation court, the county court then should be given "an opportunity to rule thereon." *Bergeron v. Travis County Court*, supra, held that a plea is "prematurely brought" if it is brought to the Texas Court of Criminal Appeals *before* it has been first considered by the county court.

It is well established that when a person is accused of a crime he may waive almost all his constitutional rights and privileges. *Levin v. U.S.*, 5 F. 2d (9th Cir.), cert. den., 269 U.S. 562 (1925); *Journigan v. State*, 233 Md. 405, 164 A. 2d 896, 898 (CCA 1960), cert. den. 365 U.S. 853 (1961). The advice of competent counsel, this Court has stated, furnishes a strong presumption of a valid waiver. *McMann v. Richardson*, 397 U.S. 759, 774 (1970). The Petitioners do not assert that they were coerced, or forced to plead nolo contendere. Petitioners do not assert that they were without adequate representation at any time following their arrest and brief confinement.

* The name of the "corporation court" was changed to "municipal court" by Acts 1969, 61st Legislature, Page 1689, Ch. 547. See Vernon's Ann. Civ. Stat., Art. 1194A.

The Petitioners plea of nolo contendere was the same as a plea of guilty insofar as the criminal prosecution was concerned, Texas Code of Criminal Procedure, Article 27.02. A plea of guilty, if voluntary and understandingly made is conclusive as to a person's guilt and constitutes a waiver of claimed deprivation of federal constitutional due process. *Fierro v. State*, 437 S.W. 2d 833 (Ct. Crim. App. 1969); *Soto v. State of Texas*, 456 S.W. 2d 389 (Ct. Crim. App. 1970), cert. den., 401 U.S. 942. This is particularly true in instances where a plea of guilty is given in a misdemeanor case. *Foster v. State*, 422 S.W. 2d 447 (Ct. Crim. App. 1968); *Utsman v. State*, 485 S.W. 2d 573 (Ct. Crim. App. 1972). This Court on several occasions held that constitutional rights were waived when a Defendant voluntarily entered a plea of guilty. *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763; *Parker v. North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785; *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747.

The Petitioners in launching their constitutional battle in Dallas' Municipal Court retained the right to relief to the State's appellate process. Article 44.17, Code of Criminal Procedure, State of Texas. The Petitioners have not shown how they were faced with any greater severity of punishment in the County Criminal Court of Appeals than they faced in Dallas' Municipal Court. This Court has previously held that a two-tier system such as exists in Texas is not violative of

procedural due process. *Colten v. Kentucky*, 407 U.S. 104 (1972).

Having once presented their claims to a state court, Petitioners should not be able to reject that judicial process by invoking solely the supplementary provisions of the Civil Rights Act of 1871 (42 U.S.C., Sec. 1983), *Buckner v. Crane*, 468 F. 2d 1228 (CCA 1972); *Coogan v. Cincinnati Bar Association*, 431 F. 2d 1209 (6 CA 1970); *Goss v. State of Illinois*, 312 F. 2d 257 (7 CA 1963). This Court has acknowledged on more than one occasion that a state court is presumed to be capable of fulfilling its solemn responsibility to guard, enforce every right granted or secured by the Constitution, *Allee v. Medrano*, 42 U.S.L.W. 4736 (May 20, 1974); *Robb v. Connally*, 111 U.S. 624, 637 (1884).

II.

THE PETITIONERS' COMPLAINT DOES NOT DEMONSTRATE A GENUINE THREAT OF PROSECUTION UNDER THE DISPUTED ORDINANCE AND SINCE THERE IS NO STATE PROSECUTION PENDING, THE PETITIONERS' COMPLAINT MUST FAIL BECAUSE OF MOOTNESS.

Petitioners cannot obtain declaratory relief where there is no state prosecution pending and there is not demonstrated a genuine threat of prosecution under the disputed ordinance. The Petitioners' past exposure to illegal conduct does not in itself show a case or controversy deserving of federal intervention. Past exposure to illegal conduct does not in itself show a present case or controversy unaccompanied by any continuing, present adverse effects. *O'Shea v. Littleton*, 42

U.S.L.W. 4139 (Jan. 14, 1974); *Zwickler v. Kotta*, 389 U.S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967).

The Petitioners' Complaint requests equitable relief as to only two of the named Defendants, Frank Dyson, individually in his capacity as Chief of Police of the City of Dallas, and Hugh Jones, individually and in his capacity as Clerk of the Corporation Court of the City of Dallas (A-9 and 10). The Defendants, Frank Dyson and Hugh P. Jones, are no longer employed by the City of Dallas. Further, Defendant Scott McDonald, former City Manager, has along with Dyson and Jones, retired from employment with the City of Dallas. The wrongful conduct charged in the Complaint is far the most part personal to the Defendants Frank Dyson and Hugh P. Jones, despite the fact that they were sued in their capacity as Chief of Police and Clerk of the Municipal Court. No charge is made in the Complaint that intentional practices of the former Chief of Police, Clerk of Municipal Court, and City Manager, are continuing as previously alleged. The Petitioners on Page 8 of their Brief even suggest that "Fresh evidence concerning the status and whereabouts of the Petitioners and enforcement patterns would be desirable." Petitioners have failed to substitute the names of the incumbent Chief of Police, City Manager, and Municipal Court Clerk for Dyson, McDonald and Hugh P. Jones.

The plain fact is that on the record before this Court the Petitioners are seeking specific equitable relief of persons no longer employed by the City of Dallas, persons no longer charged with the responsibility of administering or enforcing the criminal laws, statutes and ordinances of the State of Texas

and the City of Dallas. Under the circumstances of this case, the Petitioners have failed to establish the existence of a present controversy with Respondents. For these and the above and foregoing reasons the Petitioners' Complaint is moot. *Michael O'Shea,* supra.

III.

PETITIONERS' COMPLAINT DID NOT PRESENT A SUBSTANTIAL CONTROVERSY BETWEEN PARTIES HAVING ADVERSE LEGAL INTEREST OF SUFFICIENT IMMEDIACY AND REALITY TO WARRANT THE ISSUANCE OF A DECLARATORY JUDGMENT.

The Petitioners herein seek declaratory relief from possible future prosecution under the City of Dallas' Loitering Ordinance. The Supreme Court has repeatedly stated that the basic question in seeking a declaratory judgment the constitutionality of a statute is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between the parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Golden v. Zwickler,* 394 U.S. 103, 22 L. Ed. 113, 118, 89 S. Ct. 956 (1969); *Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U.S. 270, 273, 85 L. Ed. 826, 828, 61 S. Ct. 510 (1941). (emphasis added)

The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not just at the date the action is initiated. *Steffel v. Thompson,* 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *Roe v. Wade,* 410 U.S. 113 (1973); *United States v. Munsingerwear, Inc.,* 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950); *Golden v. Zwickler,* supra.

At the time of this review three of the named Respondents are no longer working in a representative capacity for the City of Dallas. The whereabouts of the Petitioners appears to be unknown (see Page 8 of Petitioners' Brief). Even if the Petitioners still reside in Dallas, an actual concrete personal threat of prosecution does not exist. The record shows that an average of approximately two persons per day were arrested under the disputed ordinance in 1972 (A-68). For the nation's eighth largest city with a 1970 census count of 844,401 persons and a county-wide population in excess of 1,327,000 persons,* it appears that there is an extremely remote possibility of any future arrest of Tom E. Ellis and Robert D. Love. The Petitioners have not shown how there is a pattern of arrest, upon any group of which they are a member, which would in any way increase their possibility of future arrest.

When it is wholly conjectural that a person seeking declaratory relief will be again prosecuted under a statute, such a person should not be granted declaratory relief. *Golden v. Zwickler,* supra. Unless the Petitioners can show that they face a genuine and immediate threat of future prosecution under Ordinance 31-60, their case has lost its character as a present live controversy of the kind that must exist if the Supreme Court is to avoid rendering advisory opinions on abstract propositions. *Hall v. Beals,* 396 U.S. 45, 24 L. Ed. 2d 214, 218, 90 S. Ct. 200 (1969); *Golden v. Zwickler,* supra; *Baker v. Carr,* 369 U.S. 186, 204, 7 L. Ed. 2d 663, 667, 82 S. Ct. 691 (1962).

The "normal course of state criminal prosecutions cannot

* U.S. Bureau of the Census, Census of Population and Housing, 1970.

be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle v. Landry*, 401 U.S. 77, 27 L. Ed. 2d 696, 700, 91 S. Ct. 758 (1971). Past exposure to illegal conduct does not in itself show a present case or controversy if unaccompanied by any continuing, present adverse effects. *O'Shea v. Littleton, supra.* The Second Circuit found a "very real threat of enforcement" before it affirmed the Three-Judge District Declaratory Judgment in *Thoms v. Heffernan*, 473 F. 2d 478, 485 (2 Cir. 1973). A trial court's Ruling to Dismiss was upheld largely based on its finding of "No present threat of any future injury," *Alga, Inc. v. Crossland*, 327 F. Supp. 1264, 1266, aff'd, 459 F. 2d 1038 (5 Cir. 1972), cert. den., 41 U.S.L.W. 329.

Even if the Petitioners' complaint had asserted the inadequacy of relief in the Dallas County Criminal Court of Appeals, this would be an argument that Tom E. Ellis and Robert D. Love should not be able to advance. The Petitioners never did make an attempt to obtain a trial de novo. These litigants can only assert their own constitutional rights, and cannot sue for the deprivation of someone else's civil rights. *U.S. v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); *O'Malley v. Brierley*, 477 F. 2d 785 (3 Cir. 1973). The trial court did not rule that the named Petitioners, Tom E. Ellis and Robert D. Love, were properly representative of the class of persons they purport to represent in their Complaint. It is clear, however, that their standing cannot be acquired through the "back door of a class action." *Allee v. Medrano*, supra, and *O'Shea v. Littleton*, supra.

In rendering a determination in this present action this Court is still faced with the question of the applicability of *Younger v. Harris*, 401 U.S. 37 (1971). Respondents assert that standing and the continued existence of a live controversy as to the action and relation to the disputed ordinance depends on the pendency of prosecutions under the subject ordinance. To meet the *Younger* test the Petitioners would have to show bad faith harassment, or other unusual circumstances that would entitle them to federal declaratory relief.

This Court previously stated that it is a rare case where a single prosecution provides the quantum of harm that would justify federal intervention. *Allee v. Medrano*, 42 U.S.L.W. 4736; (see concurring opinions of Justice Stewart and The Chief Justice in *Steffel v. Thompson*, 42 U.S.L.W. 4357, 4365). The Petitioners' Complaint simply does not allege facts of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

IV.

SECTION 31-60 OF THE 1960 REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES OF THE CITY OF DALLAS IS NOT FACIALLY UNCONSTITUTIONAL.

The Dallas City Ordinance is not unconstitutional either facially or otherwise. As was stated by the Supreme Court in *Boyce Motor Lines v. Village of Topeka Bay*, 72 S. Ct. 329, 342 U.S. 337, 96 L. Ed. 367 at page 371, "no more than a reasonable degree of certainty can be demanded" of a criminal statute. Petitioners in cases cited rely upon situations involving statutes giving unfettered discretion to local police officers, situations wherein there was bad faith enforcement and/or

situations in which the statutes sought to penalize individuals because of racial and socio-economic status.

The Dallas City Ordinance does not penalize individuals because of racial or economic status but applies to all individuals who are acting in such a way as to provide probable cause for alarm or concern for the safety and well-being of persons or for the security of property in their immediate surrounding area. The Ordinance does not leave it to the unfettered discretion of police officers to determine whether or not a person is in violation. The essential terms of the Dallas Ordinance are defined in detail within the Ordinance and in addition thereto sets up guidelines to be used by officers in making a determination of probable cause for alarm and concern. This Ordinance, as is the case for any ordinance or statute, must be taken as a whole, and when interpreted from its four corners it is not so vague or indefinite as to be facially unconstitutional. This Court in *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 at page 590 said:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into constitutional dilema the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

In *U.S. v. Woodard*, 376 F. 2d 136 (7th Cir. 1967), the Court stated at page 140 as follows:

> "The Constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.' United States v. Petrillo, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877."

The Dallas Ordinance when measured by this criteria is not unconstitutional.

The Dallas City Ordinance is a proper exercise of the police powers of the City of Dallas with a view toward the *prevention* and the *protection* of its citizens. The Ordinance is a valid and necessary tool for law enforcement personnel to safely carry out their duties to prevent crime and protect property.

V.

PETITIONERS ARE NOT ENTITLED TO FEDERAL EXPUNGEMENT OF A VALID CONVICTION WHERE THEY HAVE WAIVED THEIR RIGHT TO APPEAL IN THE STATE COURTS.

Expungement has been ordered by a federal court of arrest records and convictions to eliminate the effects of illegal arrests. See *Sullivan v. Murphy*, 478 F. 2d 938 (D.C. Cir. 1973), *Menard v. Mitchell*, 430 F. 2d 486 (D.C. Cir. 1970), *United States v. McLeod*, 385 F. 2d 734 (5 Cir. 1967).

However, no federal court has ordered expungement of a final conviction which was not the basis of harassment and in which injunctive relief had not been sought. See generally *United States v. McLeod*, supra.

Petitioners have not shown that this prosecution was affected for harrassment purposes or that proper relief was sought to restrain the prosecution, either in the state or federal forum.

Respondents do not question the remedial powers of a federal court. However, Petitioners are precluded from outright physical expungement of their convictions where state law requires

an entry of the disposition in each case. Texas Code of Criminal Procedure, Art. 45.13. Having elected to proceed in the state court and there having waived their right of appeal, Petitioners may not later complain that a conviction, valid when entered, is invalid and requires expunction should the ordinance used in the prosecution later be held unconstitutional. In this case the Petitioners would be only entitled to an entry on the state court records showing the final disposition of this present action.

CONCLUSION

Respondents respectfully submit that the Petitions have not shown by this present action that they are entitled to federal equitable relief for the following reasons:

(1) When the Petitioners voluntarily plead guilty in the state court to violating Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, they waived their right to further present their constitutional claims which comprise the basis of this present action;

(2) The Petitioners' complaint must fail because of mootness;

(3) Petitioners' complaint did not present a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment and the granting of other equitable relief.

Respondents assert that based on the foregoing the trial court did not abuse its discretion in dismissing the Petitioners' complaint.

WHEREFORE, PREMISES CONSIDERED, Respondents pray judgment of this Court.

Respectfully submitted,

N. ALEX BICKLEY,
Attorney of the City of Dallas,
DOUGLAS H. CONNER,
Assistant City Attorney,
501 Municipal Building,
Telephone: 748-9711, Ext. 294,
Dallas, Texas 75201,
Attorneys for Respondents.

D H Conner

CERTIFICATE OF SERVICE

I do certify that a true and correct copy of this Brief has been served upon Mr. Walter W. Steele, Jr., 3315 Daniels, Dallas, Texas 75205, Attorney for Petitioners, by depositing the same in the United States Certified Mail, Return Receipt Requested, on this the 21 day of August, 1974.

D H Conner

Douglas H. Conner